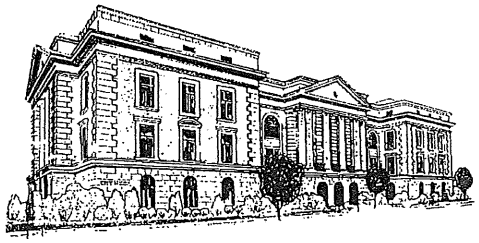

Battle Creek City Planning Commission

Staff report for the May 25, 2011 meeting

To: Planning Commissioners

From: Christine M. Hilton, AICP, Planning Supervisor
Planning and Community Development Department

Date: May 16, 2011

Subject: Zoning Amendments in accordance with Zoning Enabling Act and Planning Enabling Act.

Attached to this memo are proposed amendments to the City of Battle Creek zoning ordinance that identifies statutory references to State Planning and Zoning Enabling Legislation by correcting such references to "Michigan Planning Enabling Act, PA 33 of 2008, as amended" and/or "Michigan Zoning Enabling Act, PA 110 of 2006, as amended" or similar language where applicable, and by bringing it into conformance with and/or correcting zoning provisions as required under said Acts.

The original city zoning enabling legislation dated from 1921; later on, separate legislation was adopted for Counties and Townships, each having their own requirements for public hearing notifications, variances, and board/commission structure. Additionally, even within each separate statute there were different requirements for public notification procedures, dependent upon the type of request. Due to the confusion and difficulty in applying the law consistently across various governmental bodies, the enabling legislation was unified into the Zoning Enabling Act of 2006 and Planning Enabling Act of 2008, both of which have been amended since their adoption. Attached to this memo is a summary from the Michigan Association of Planning that describes the process and changes to the legislation. Also included to this memo is a report from the former Planning Director that outlines a brief summary of the act requirements and the existing applicable City of Battle Creek Zoning Ordinances.

The proposed amendments are included. While they seem rather lengthy, most of the verbiage included in these documents remain intact and require no amendments. However, they were left within the documents for contextual reasons and ease of review. **It is important to note the changes being proposed are NOT regulatory in nature, but merely clarify existing language in the ordinance as well as incorporate statutory requirements, including correct statute citations, board/commission structure and the public notification process.** Since the time the legislation was adopted, the City has been following the requirements of the statute, but it is necessary to incorporate them into our local ordinance.

As with typical revisions, the proposed amendments are shown by new language being underlined, and language to be removed being struck-though. Following those amendments required by statute, the City Attorney's office has cited the appropriate statute. Following is a brief summary of the proposed changes to the ordinance:

Ch. 1202 Membership of Planning Commission

- Revise/clarify membership structure, conflict of interest, bylaws, annual report

Ch. 1212 Administration, Enforcement and Penalty

- Expanded authority, public notification process, approval process, conformity to master plan

Ch. 1230 General Provisions and Definitions

- Revised definitions for state licensed residential facility, group child care home, home occupation, corner and interior lot, and rooming house

Ch. 1232 Administration, Enforcement and Penalty

- Revise public notification process for zoning amendments, addition of protest petition, fee, transfer of ownership
- Revise/clarify membership structure
- Revise/clarify appeals process to ZBA and public notification for variance requests
- Addition of voting requirements, variance standards, and appeals of ZBA decisions

Ch. 1288 Nonconforming Uses and Structures

- Addition of acquisition, elimination, and appeals process

Ch. 1289 Planned Unit Residential Development

- Clarify definition of PURD, performance bond

Ch. 1290 Special Land Uses

- Clarify decision of SUP's, and addition of requirements for approvals w/ conditions

Ch. 1291.08 Airport Zoning

- Revise standard for granting variance

Ch. 1292 Home Occupation

- Further define home occupation

Ch. 1294 Site Plan Review

- Clarify decisions and approval of site plans.

Ch. 1296 Signs

- Revise standards for granting variance

MICHIGAN MAP ASSOCIATION OF PLANNING

A Chapter of the American Planning Association

Michigan Zoning Enabling Act Replaces State's Three Separate Zoning Statutes

It started with a phone call to the Michigan Association of Planning (MAP) office in November 2004 from then-freshman Representative Kevin Elsenheimer, R-105. Not a month into his first term of office, House Republican Elsenheimer, a zoning attorney in Bellaire, Michigan, was anxious to introduce legislation that would have a positive impact on land use, and had called to inquire about MAP's priorities for legislative action.

Recognizing the significance of the call, Representative Elsenheimer was immediately informed about MAP's legislative agenda, our recently released *New Directions Report* (an in-depth study of Michigan's planning, zoning, and land division laws, and a series of 27 specific recommendations for change, released in March 2004), and the Michigan Land Use Leadership Council (MLULC) Final Report (released in August 2004). Each of these documents recommended the unification of the state's planning and zoning enabling acts.

As an attorney with expertise in land use and zoning, Representative Elsenheimer was well aware of problems associated with local implementation of three separate zoning acts, and the pressing need to create a single Zoning Enabling Act. Thus was born what would become an 18-month process to unify the Township Zoning Act (Public Act 184 of 1943), the City and Village Zoning Act (Public Act 207 of 1921), and the County Zoning Act (Public Act 183 of 1943) into a single Zoning Act.

Unification of the state's zoning enabling legislation has long been a priority of MAP, and our law committee initiated research, review, comparison, and analysis of the three zoning acts many months before receiving the call from Representative Elsenheimer. Already in-hand were reports, including a comparison table of the three acts which identified the text that was common to all three statutes, proposed new text to make the statutes uniform, highlighted text found only in one of the acts, as well as text proposed for removal. This line by line, color-coded comparison chart would become a critical document during the review period, widely appreciated by working group members, and it greatly simplified the unification process.

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Instrumental in advancing the legislation quickly and accurately through the process was the creation of sample bill language for a single zoning act by Richard Norton, Ph.D, J.D., Professor of Urban and Regional Planning at the University of Michigan, and an active member of MAP's Law Committee. The Michigan Association of Planning "bill" was forwarded by Representative Elsenheimer to the Legislative Service Bureau (LSB), where modifications to the MAP model were made, and House Bill (HB) 4398 was introduced on February 23, 2005.

Upon introduction of HB 4398, which proposed the creation of the Michigan Zoning Enabling Act, Representative Elsenheimer convened a diverse working group met at least once a month over the next year to reach consensus on the final bill language. A working group is a common approach to bring together stakeholders to hash out the issues, and among those represented were the Michigan Association of Planning, the Michigan Municipal League (MML), the Michigan Association of Counties (MAC), the Michigan Townships Association (MTA), the Michigan Association of Home Builders (MAHB), the Michigan Association of Realtors (MAR), the Michigan Environmental Council (MEC), government agency representatives from the Department of Labor and Economic Growth (DLEG), the Department of Natural Resources (DNR), and the Department of Environmental Quality (DEQ).

Representative Elsenheimer established clear ground rules for the work group from the start. The effort would only unify the three zoning acts, that is, no substantive changes be introduced into the discussion. Consensus on all issues would be required before the bill would move forward. And for the most part, Representative Elsenheimer was steadfast in adherence to these principles. It should be noted, however, that several changes that are considered more substantive have been incorporated into the new legislation, but the changes were initiated by one of the stakeholders or Representative Elsenheimer, and all stakeholders concurred with the changes and agreed that the changes would significantly improve the final statute.

Some of the more substantive changes that were incorporated into the new zoning act include:

- General reorganization of the Act into seven logical articles: Article I, General Provisions, which now includes a definition section; Article II, Zoning Authorization and Initiation; Article III, Zoning Commission; Article IV, Zoning Adoption and Enforcement; Article X, Special Zoning Provisions; Article XI, Zoning Board of Appeals; and Article XII, Statutory Compliance and Repealer. The reorganization results in a more intuitive structuring and flow of the law.
- Consolidation of all public hearing notice requirements into a single section based on the current procedures used for special land uses in all three statutes. This change is intended to create a single process for notification that works for ordinance adoption and amendment, rezonings, special land uses, planned unit developments, variances, and other actions by the Zoning Board of Appeals (ZBA).

- The phasing out of zoning boards in townships and zoning commissions in counties over a five year period, with responsibility to be transferred to the planning commission. This consolidates planning and zoning authority in all jurisdictions to the planning commission and makes it easier to ensure zoning is based on the master plan.
- Elimination of state review of county zoning ordinances and amendments. The current process simply adds time before the decision of the county board is put into place, as there is no consistent substantive review by the state of the content of the zoning action.
- Retaining the use variance authority in cities and villages and extending it only to those townships and counties which had it in the zoning ordinance as of February 15, 2006. The use variance issue was one of the more complicated to be discussed by the work group. The Paragon case (*Paragon Properties Co. v. City of Novi*), and subsequent appellate court cases muddied the waters about which municipal entities had the legal authority to grant use variances, although it is clear to most planning practitioners that until the recent appellate court opinion of *Grabow v. Macomb Township* (decided March 9, 2006) use variance authority was never explicitly granted to townships, and only through inadequately considered appellate court rulings did townships come to believe they had that authority. In fact, review of the history of the creation of the enabling legislation for each jurisdictional type, and subsequent case law, decidedly favors the position that only cities and villages explicitly have that power. Few townships or counties in Michigan actually use this authority (and the governing bodies of many cities and villages have prohibited their Zoning Boards of Appeal from using it either).

And in an unusual twist during the work group discussions, this use variance position was taken by both the home builders and MAP, organizations which often assume divergent positions in the land use debate, although for different reasons. MAP maintains that use variance authority, even in cities and villages, usurps the power of the legislative body, which makes (and should continue to make) final decisions about zoning for a community. Allowing a Zoning Board of Appeals to grant use variances, which effectively rezones a property, usurps the elected bodies authority to make zoning decisions for the jurisdiction. The home builders, on the other hand, perceive the use variance authority in townships to be yet another administrative hurdle to be conquered as they exhaust their remedies before utilizing the court system to resolve land use disputes. But nevertheless, our agendas on this matter are the same, if for different reasons, and MAP considers them an ally as we worked to rectify bill language both organizations deemed damaging.

Equally important is the role of the MTA, whose Board agreed that the use variance authority should not be extended to ZBAs, but who also recognized some townships had already given use variance authority to the ZBA based on the appellate court decisions. Thus, MTA supports the compromise language that grandparents only those townships that had given use variance authority to the ZBA by February 15, 2006. That date was

selected because it is the date the compromise was proposed jointly by MAP and the Homebuilders with the support of MTA.

Passage of the Michigan Zoning Enabling Act is important for many reasons. Simplified language and fewer pages (the new act reduces by two-thirds the number of pages of statute) resulting in a zoning act that is easier for communities to understand and navigate. The many differences between three acts no longer have to be remembered, and it becomes irrelevant whether there was a rational reason for the differences to begin with. Common public notification requirements create a clear and consistent system, uniformly applied for all requests. A structure is in place that is easier to amend in the future.

A single zoning act is the first step to unifying not only a set of laws, but communities across the state who are committed to making better land use decisions.

It is expected that the bill will be signed by Governor Jennifer Granholm within a month, and will take effect July 1, 2006.

The Michigan Association of Planning counts among its members some of the best land use and planning minds in the state, and we are privileged that a cadre of committed professionals dedicated scores of hours over the last year to this effort. MAP Law Committee members who contributed to this endeavor include Chairperson Jerry Rowe, PCP (Southeast Michigan Council of Governments), Doug Piggott, AICP, PCP (Rowe Incorporated), Cynthia Winland, AICP, PCP (Crescent Consulting, Inc.), Mary Ann Lampkin, AICP, PCP, Rebecca Harvey, AICP, and MAP Board Liaison Jane Fitzpatrick.

The Michigan Association of Planning offers special thanks to two law committee members who went well beyond the typical demands of a volunteer committee position. The expert legal skills of Dr. Richard Norton, coupled with his thorough knowledge of planning theory, were incredibly valuable to MAP and other stakeholders during this process. Dr. Norton was appointed to the law committee in October 2004, only one month before we received the call from Representative Elsenheimer. He dove right in, volunteering to write the first draft of the "bill" that would become the model for the Michigan Zoning Enabling Act, attending work group meetings, and writing briefs and responses which often required a turn around time of only a couple of days.

In addition, the technical expertise, keen insights on the historical aspects Michigan's zoning laws, proficiency about land use case law, and "in the trenches" knowledge of municipal implementation of the zoning acts provided by committee member Mark Wyckoff, FAICP, now with the Planning & Zoning Center at Michigan State University, were noteworthy. He brought to the table a resolve to accomplish this important task and a passion for excellence that inspired us all.

Also thank you to the many community planners who wrote letters of support for the zoning bill to Senator Patricia Birkholz, R-24, as it moved from the House to the Senate.

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Grass roots advocacy is critical, and the many voices of MAP members were heard by Senator Birkholz and her committee.

Finally, Representative Kevin Elsenheimer is to be commended for taking up this important legislation; for convening a diverse work group, and leading it to consensus; and for listening to stakeholder issues and thoughtfully weighing our professional considerations. Brian Mills, his chief aide, worked tirelessly on the details, never missing a beat, and kept all stakeholders well-informed. Senator Patricia Birkholz and her chief of staff Sally Durfee, and all members of the Natural Resources and Environmental Affairs Committee are applauded for working through the tedious use variance issue, and for their desire to clearly understand its complexities before moving forward. All deserve our thanks and continued support for their effort in taking the first step to modernize Michigan's zoning enabling acts.

Andrea Brown, AICP, Michigan Association of Planning Executive Director

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CITY OF BATTLE CREEK, MICHIGAN

The MICHIGAN ZONING ENABLING ACT (P.A. 110 of 2006) and Recommended PLANNING AND ZONING CODE AMENDMENTS To Comply With This Act

Prepared by: ***Planning and Community Development Staff***
In consultation with the City Attorney

In 2006, the State of Michigan approved the Michigan Zoning Enabling Act of 2006 (P.A. 110 of 2006, as amended, M.C.L. 125.3101 et seq). The act took effect on July 1, 2006, and served to consolidate and codify the enabling acts for cities, villages, townships and counties. This codification resulted in process and procedural changes for zoning commissions, zoning boards of appeal and planning commissions. All local governments were required to begin to follow these new regulations immediately.

The City of Battle Creek complied with this requirement and immediately began to follow these statutory requirements, with the most significant changes coming from the public notice requirements for the Planning Commission and the Zoning Board of Appeals.

It has been strongly recommended that to ensure that citizens, local officials and developers are not confused and make a mistake by following the zoning ordinance when the new statute has different requirements, that appropriate and necessary changes be made to the zoning ordinance at the earliest possible opportunity. It also would ensure that all of a community's boards and commissions, as well as the planning and legal staff, are fully aware of the new regulations. Advice for communities was to target a July 1, 2007 deadline to amend the local ordinances.

Most of the City of Battle Creek's Planning and Zoning Code requirements already comply with these statutory changes. Nevertheless, we have gone through and identified a number of amendments that we feel would be necessary to fully comply with the act and avoid any potential conflicts or confusion in interpretation.

This report outlines those proposed changes, providing a brief summary of the act requirements, the existing applicable City of Battle Creek ordinance provisions (either Planning Commission or Zoning Board of Appeals), and the suggested necessary changes.

Finally, this review will also require revisions to the bylaws of both the Planning Commission and the Zoning Board of Appeals, comparing them to the new Michigan Zoning Enabling Act, and if necessary, updating them to reflect these new provisions. That review is also in progress.

PROPOSED PLANNING AND ZONING CODE AMENDMENTS

I. Legal Basis

The legal citation for authority to have a zoning ordinance has changed with the adoption of P.A. 110 of 2006. As it relates to the legal authority for cities, it is recommended that the following amendment be made:

> ***Legal Basis***
> *This ordinance is enacted pursuant to P.A. 207 of 1921, as amended, (being the City and Village Zoning Act, M.C.L. 125.581 et seq). The continued administration of this Ordinance, amendments to this Ordinance, and all other matters concerning operation of this Ordinance shall be done pursuant to P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3101 et seq) hereinafter referred to as the "Zoning Act".*

II. Public Notice Requirements

Under P.A. 110 of 2006, all public notice requirements in cities, villages, townships and counties for all zoning activities have been consolidated into a single set of requirements.

Battle Creek Planning Commission
Current Public Notice Requirements

> ***1232.06 (e)*** *Public Hearings.*
>
> *(1) On any amendment to this Zoning Code, the Planning Commission shall hold a public hearing prior to the amendment being referred to the City Commission for action. A record of the comments received at the public hearing shall become a part of the Planning Commission report and recommendation to the City Commission. The following requirements shall pertain to public hearings held before the Planning Commission:*
>
> *A. Not less than fifteen days notice of the date, time and place of the hearing shall be published in a newspaper of general circulation in the City.*
> *B. Not less than fifteen days notice of the date, time and place of the hearing shall be given, by regular mail, to each public utility company and to each railroad company owning or operating any public utility or railroad within the City that registers its name and mailing address with the City Clerk for the purpose of receiving such notices.*
> *C. Not less than fifteen days notice shall be given, by regular mail, to property owners located within 300 feet of the property affected by the amendment, as listed in the most current assessment roll. However, failure to mail such notice, or failure of property owners to receive such notice, shall not invalidate the amendment.*
>
> *(2) The City Commission, upon receipt of the Planning Commission study and report, shall publish a notice indicating the proposed amendment, proposed use and affected property in a newspaper of general circulation in the City. Such notice shall be published at least five days before the City Commission meeting, and shall indicate the time, date and place of such meeting.*
>
> *(f) Fees. Petitions for an amendment to this Zoning Code shall be accompanied by a fee of two hundred fifty dollars ($250.00). Such fee is applicable when filing a petition for zoning reclassification or special use permits and is nonrefundable.*
>
> *(Ord. 36-84. Passed 12-18-84.)*

Battle Creek Zoning Board of Appeals
Current Public Notice Requirements

> *1234.03*
>
> *(c) The Board shall fix a reasonable time for the hearing of an appeal and give ten days notice thereof to all persons to whom real property within 300 feet of the premises in question is assessed and to the occupants of all single and two-family*

dwellings within 300 feet. Such notice shall be delivered personally or by mail, addressed to the respective owners and tenants at the addresses given in the last assessment roll. The Board shall decide the same within thirty days after the final hearing thereon. If the tenant's name is not known, the term "occupant" may be used. Any party presenting an appeal to the Board shall appear in person or by agent or attorney at the hearing.

Changes Necessary:
Section 103, MCL 125.3103, requires:

(1) Except as otherwise provided under this act, if a local unit of government is required to provide notice and hearing under this act, the local unit of government shall publish notice of the request in a newspaper of general circulation in the local unit of government.

(2) Notice shall also be sent by mail or personal delivery to the owners of property for which approval is being considered. Notice shall also be sent to all persons to whom real property is assessed within 300 feet of the property and to the occupants of all structures within 300 feet of the property regardless of whether the property or occupant is located in the zoning jurisdiction.

(3) The notice shall be given not less than 15 days before the date the application will be considered for approval. If the name of the occupant is not known, the term "occupant" may be used in making notification under this subsection. The notice shall do all of the following:

- *(a) Describe the nature of the request.*
- *(b) Indicate the property that is the subject of the request. The notice shall include a listing of all existing street addresses within the property. Street addresses do not need to be created and listed if no such addresses currently exist within the property. If there are no street addresses, other means of identification may be used.*
- *(c) State when and where the request will be considered.*
- *(d) Indicate when and where written comments will be received concerning the request.*

In Section 202 of the Michigan Zoning Enabling Act, it exempts the local unit of government from publishing the individual addresses in the notice if there are 11 or more properties. This appears to only apply to rezonings, and only states that the individual notices are not ***required*** where 11 or more properties are involved.

125.3202.new Zoning ordinance; determination by local legislative body; amendments or supplements; notice of proposed rezoning.

Section 202

(1) The legislative body of a local government may provide by ordinance for the manner in which the regulations and boundaries of districts or zones shall be determined and enforced or amended, supplemented or changed. Amendments or supplements to the zoning ordinance shall be made in the same manner as provided under this act for the enactment of the original ordinance.

(2) If an individual property or 10 or fewer adjacent properties are proposed for rezoning, the zoning commission shall give a notice of the proposed rezoning in the same manner as required under section 103.

(3) If 11 or more adjacent properties are proposed for rezoning, the zoning commission shall give a notice of the proposed rezoning in the same manner as required under section 103, except for the requirement of section 103.(2) and except that no individual addresses of properties are required to be listed under section 103(3)(b).

(4) An amendment to a zoning ordinance by a city or village is subject to a protest petition under section 403.

(5) An amendment for the purpose of conforming a provision of the zoning ordinance to the decree of a court of competent jurisdiction as to any specific lands may be adopted by the legislative body and the notice of the adopted amendment published without referring the amendment to any other board or agency provided for under this act.

Other than a few recent "upzoning" initiatives in several of our older neighborhoods, we receive very few petitions for rezoning involving more than 11 properties. Nevertheless, in those instances where we are initiating significant upzoning efforts, this option could provide a significant cost savings in the publication of hearing notices. For example, there are several hundred properties potentially impacted by a project we are currently working

on for the Fremont-McKinley-Verona Neighborhood Planning Council.

III. Misfeasance, Malfeasance or Nonfeasance Applicable to Zoning Boards, Zoning Commissions and ZBAs.

The Michigan Zoning Enabling Act now provides that *"The legislative body shall provide for the removal of a member of the zoning commission for misfeasance, malfeasance or nonfeasance in office upon written charges and after public hearing."* (Section 301(9) (MCL 125.3301(9)) This language is repeated for zoning boards of appeals. It is recommended that if the zoning ordinance includes language relative to misdeeds of the zoning board, zoning commission or the ZBA, then it should be amended to reflect this language.

Battle Creek Planning Commission
Current Member Removal Requirements

1202.03 REMOVAL OF MEMBERS.

Members of the Planning Commission, may, after a public hearing, be removed by the Mayor for inefficiency, neglect of duty or malfeasance in office. (Ord. 36-84. Passed 12-18-84.)

Battle Creek Zoning Board of Appeals
Current Member Removal Requirements

1234.01 ESTABLISHMENT; POWERS; MEMBERSHIP; COMPENSATION

(d) The Board or the City Commission may, after a hearing, remove a member of the Board for inefficiency, neglect of duty or malfeasance. (Ord. 36-84. Passed 12-18-84.)

The amendments proposed here would merely add the words "misfeasance" and "nonfeasance" to Sections 1202.03 and 1234.01 of the Planning and Zoning Code.

IV. Planning Commission Member Required on the Zoning Board of Appeals

A member of the planning commission must sit on the zoning board of appeals. (Section 601(3), MCL 125.3601)

Battle Creek Zoning Board of Appeals
Current Member Requirements

1234.01 (b) currently provides that *"At least one member of the Board shall be a member of the City Planning Commission".*

In order to comply with the legislation, the words "*At least*" should be deleted from 1234.01 (b). In amending this section, we could also remove the references to ZBA monetary compensation, long ago eliminated.

V. Vacancies on the Zoning Board of Appeals Must be Filled Within One Month

A successor member of the ZBA must be appointed not more than one month after the term of the preceding member has expired. (Section 601(9), MCL 125.3601)

No such limitation currently exists within Chapter 1234.

P.A. 110 of 2006 states:

> *"(9) The terms of office for members appointed to the zoning board of appeals shall be for 3 years, except for members serving because of their membership on the zoning commission or legislative body, whose terms shall be limited to the time they are members of those bodies. When members are first appointed, the appointments may be for less than 3 years to provide for staggered terms. A successor shall be appointed not more than 1 month after the term of the preceding member has expired. Vacancies for unexpired terms shall be filled for the remainder of the term."*

We would suggest that the addition of the within one month appointment requirement to Section 1234.01 (b) of the Planning and Zoning Code.

VI. Discretion in Application of Standards for Adult Foster Care Facilities; Family or Group Day-Care Homes in Cities

Section 106 consolidates the adult foster care facility standards and Section 206(4), MCL 125.3206(4), requires townships and counties to issue special use permits if group day-care homes meet certain standards, whereas cities and villages are given discretion in the issuance of such permits. (Section 206(5), MCL 125.3206(5))
It is clear from this requirement that a local unit of government may not discriminate against persons with disabilities by preventing the citing of state licensed residential facilities in residential zoning districts. "State licensed residential facility" is defined by the act to mean a structure constructed for residential purposes that is licensed by the state under the adult foster care facility licensing act (P.A. 218 of 1979, MCL 400.701 to 400.737, or P.A. 116 of 1973 MCL 722.111 to 722.128), and provides residential services for 6 or fewer persons under 24-hour supervision or care.

In 1988, Congress amended the The Fair Housing Act to add protections for persons with disabilities. The Fair Housing Act makes it unlawful --

- *To utilize land use policies or actions that treat groups of persons with disabilities less favorably than groups of non-disabled persons. An example would be an ordinance prohibiting housing for*

persons with disabilities or a specific type of disability, such as mental illness, from locating in a particular area, while allowing other groups of unrelated individuals to live together in that area.

On the advice of the then City Attorney, since 1988 we have not restricted the placement of any adult licensed foster care facility for 6 or fewer persons in any residential zoning district in the City of Battle Creek. We do, however, provide for the issuance of a special use permit for state licensed residential facilities for more than six residents.

Chapter 1290, Section 1290.01 (b)

(7) State licensed residential facilities for more than six residents, community residential facilities or group homes, provided that any such use:

A. Is located on a lot that is not less than one-half acre and has not less than 500 square feet of lot area per person, including patients, employees and other residents;
B. Provides a front yard of not less than fifty feet;
C. Provides side yards of an aggregate of fifty feet and in no instance less than fifteen feet;
D. Is limited to an identification sign as described and permitted in Chapter 1296;
E. Provides parking as required in Chapter 1284 applying to the particular use proposed; and
F. Is located outside of a 1,500 foot radius of the property lines of any other facility listed in paragraphs (b)(1) to (6) hereof;

We are somewhat confused by the provisions of P.A. 110 which provides in Sec. 206 (5):

"For a city or village, a group day-care home may be issued a special use permit, conditional use permit, or other similar permit."

This section does not use the term "state licensed residential facility".

It appears that cities would still be permitted to restrict the placement of adult foster care facilities licensed by a state agency for care and treatment of persons released from or assigned to adult correctional institutions, we presume regardless of the number of residents.

The act further provides the process for measuring distances, when as in our 1290.01(b)(7)F., we require that a facility be located outside of 1,500 from another facility, requiring that it be measured along a public road, street or place. We wish that we had been asked for input into this, as using this means of measurement, foster care facilities could be located back to back, but still be outside of 1,500 feet from each other.

VII. Special Land Use Decisions

A written *"statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed"* is required with any special land use decision. The ***findings*** language is new (Section 502(4), MCL 125.3502(4)).

Written "findings of fact" are required in order to support the decision of the hearing body to approve or deny a special use permit. Findings are the legal footprints left by local decision-makers to show how the decision-making process progressed from the initial facts to the decision.

We can understand why findings of fact are important. They "bridge the analytical gap between the evidence presented and the ultimate decision. If the decision is challenged, a court will examine the evidence supporting the findings to determine whether the hearing body abused its discretion when acting on a special use permit. Such an abuse of discretion is to be found when: (1) the agency did not proceed in a manner prescribed by law; (2) the agency's decision is not supported by findings; and (3) the agency's findings are not supported by evidence on the record.

Battle Creek Planning Commission
Current Report and Recommendation Requirements

Chapter 1232, 1232.06 provides for the following:

> *(b) Definition. An amendment to this Zoning Code shall be deemed to be any change to the text or to the Official Map, including:*
>
> *(1) Petitions for zoning reclassification; or*
> *(2) **Special use permits**.*
>
> *(d) Action by Planning Commission. The Planning Commission shall cause a **complete study** of the petition to be made by the Planning and Community Development Director and shall recommend to the City Commission such action as it deems proper.*

The new legislation states:

> *"Sec. 502*
> *(1) The legislative body may provide in a zoning ordinance for special land uses in a zoning district. A special land use shall be subject to the review and approval of the zoning commission, the planning commission, an official charged with administering the zoning ordinance, or the legislative body as required by the local zoning ordinance. The zoning ordinance shall specify all of the following:*
>
> *(a) The special land uses and activities eligible for approval and the body or official responsible for reviewing and granting approval.*
> *(b) The requirements and standards for approving a request for a special land use.*
> *(c) The procedures and supporting materials required for the application, review, and approval of a special land use.*
>
> *(2) Upon receipt of an application for a special land use which requires a discretionary decision, the local unit of government shall provide notice of the request as required under section 103. The notice shall indicate that a public hearing on the special land use request may be requested by any property owner or the occupant of any structure located within 300 feet of the property being considered for a special land use regardless of whether the property or occupant is located in the zoning jurisdiction.*

(3) At the initiative of the body or official responsible for approving the special land use or upon the request of the applicant, a real property owner whose real property is assessed within 300 feet of the property, or the occupant of a structure located within 300 feet of the property, a public hearing shall be held before a discretionary decision is made on the special land use request.

*(4) The body or official designated to review and approve special land uses may deny, approve, or approve with conditions a request for special land use approval. **The decision on a special land use shall be incorporated in a statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed.**"*

While we believe that the Report of the Planning Commission may satisfy the spirit and intent of this requirement, it may be advisable to amend the ordinance (Section 1232.06 (d)) to specifically require ***a statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed.***

The final section of this report includes additional discussion regarding special uses.

VIII. Zoning Board of Appeals and Use Variances Authority and Vote Requirements

We are not required to provide for the granting of use variances. In fact, there was quite a bit of discussion in the drafting of the Michigan Zoning Enabling Act that this usurps the power of the legislative body in that it allows uses that may not otherwise be permitted in a zoning district.

The Michigan Zoning Enabling Act includes compromise language pertaining to use variances and the authority of the Zoning Board of Appeals to grant them. Clear distinctions have previously been provided to the Planning Staff by the City Attorney regarding the standards for considering use variances versus non-use (or dimensional) variances, but these are not included with the language zoning ordinance.

The legislation states that this authority is *permissive*, not required, and that it is up to the local unity of government to decide whether it wants to provide for the issuance of use variances.

If we are going to keep this option available, the ordinance should be amended to provide the now clearly stipulated requirement that in order to grant a use variance, a two-thirds (2/3) vote of the membership of the zoning board of appeals is required. This may most appropriately be included in Section 1234.04 (b)(2).

We would further suggest that the Zoning Board of Appeals' bylaws be reviewed to include this requirement for a two-thirds approval vote on use variances in their rules of procedure.

IX. Zoning Board of Appeals and Use Variances
Standards for Use Variances

The Michigan Zoning Enabling Act has incorporated the Michigan Appellate Court's distinction that a use variance requires a showing of ***unnecessary hardship***, while a non-use (dimensional) variance requires a showing of ***practical difficulty***. (Section 604(7), MCL 125.3604(7))

It would probably be advisable to include ordinance language clarifying this distinction as the words "unusual and practical difficulties", "hardship or practical difficulty", "unnecessary hardship" and "unusual hardship" appear to be almost interchangeable.

X. Zoning Board of Appeals
Appeals to Decisions of the ZBA

Occasionally, albeit rarely, one asks about the ability and process for appealing a decision of the Zoning Board of Appeals. We know that the only appeal is to circuit court, and that it must be filed within 30 days of the decision, but this is not specified within the ordinance.

Section 606 (3) MCL125.3606 states that:

> *"An appeal under this section shall be filed within 30 days after the zoning board of appeals certifies its decision in writing or approves the minutes of its decision. The court shall have jurisdiction to make such further orders as justice may decide. An appeal may be had from the decision of any circuit court to the court of appeals."*

This appeal provision could be added as the final section of Chapter 1234.

XI. Zoning Board of Appeals
"Affected" versus "Aggrieved" Parties

If the ordinance uses the term "affected parties" when referring to appeals, it should be changed to "aggrieved parties", as that is the new uniform standard. (Sections 605 and 606, MCL 125.3605 and 125.3606)

Battle Creek Zoning Board of Appeals
Current Use of Term "Affected" in Ordinance

> *1234.03 APPEALS.*
>
> *(a) An appeal may be taken to the Zoning Board of Appeals by any person* ***affected*** *by a decision of the Building Inspection Department. Such appeal shall be taken within such time as is prescribed by the Board by general rule, by filing with the Department a notice of appeal, specifying the*

grounds thereof. The Department shall transmit to the Board all of the papers constituting the record upon which the action appealed from was taken.

This amendment would merely involve the replacement of the word "affected" in Section 1234.03 with the word "aggrieved".

Additional Discussion on Special Land Uses and Special Use Permits

"Special land uses" are those uses of land which may be appropriate and compatible with existing or permitted land uses in a particular zoning district if individualized care is taken to assure that the characteristics of the use under consideration are compatible with adjacent land uses, the natural aspects of the site, and the general character of the area, including the availability of public services and facilities.

The City of Battle Creek's Planning and Zoning Code currently lists twenty-nine (29) uses that are allowed by special use permit.

The process for approving special land uses involves the issuance of a "special use permit" by the City Commission, after a public hearing is held and a recommendation is forwarded to them by the Planning Commission. While these are discretionary decisions, they must be based on clear standards. The applicant should know what standards they must meet to be approved for a special use permit. The most important question for the Planning Commission to answer in considering a special use permit application is "*Is that an appropriate location for that use*?"

A few important points to remember ---

⇒ ***Zoning runs with the land, not the owner of the land. If property changes hands, whatever zoning approval is in place carries over to the new owner. The new owner must still meet the conditions associated with any prior zoning approval.***

⇒ ***There is no legislative authority to grant approval of a land use for a temporary period of time, unless the use itself is temporary. For example, one of the special use permitted items within our Planning and Zoning Code is "Commercial, recreational or amusement developments for temporary or seasonal periods".***

⇒ ***The focus of the Planning Commission's deliberation should be to review each standard and determine if the proposed special use meets that standard or not. If each standard is found to be met, then the special land use must be approved. If it does not meet a standard, then the issue becomes "are there conditions which can be imposed on the special use which results in the project meeting the standard?"***

There are other reasons that one might consider including conditions in the issuance of a special use permit. Under the new Michigan Zoning Enabling Act, 125.3504, Section 504 (4) states that:

"Reasonable conditions may be required with the approval of a special land use, planned unit development, or other land uses or activities permitted by discretionary decision. The conditions may include conditions necessary to insure that public services and facilities affected by a proposed land use or activity will be capable of accommodating increased service and facility loads caused by the land use or activity, to protect the natural environment and conserve natural resources and energy, to insure compatibility with adjacent uses of land, and to promote the use of land in a socially and economically desirable manner. Conditions imposed shall meet all of the following requirements:

(a) Be designed to protect natural resources, the health, safety, and welfare, as well as the social and economic well-being, of those who will use the land use or activity under consideration, residents and landowners immediately adjacent to the proposed land use or activity, and the community as a whole.
(b) Be related to the valid exercise of the police power and purposes which are affected by the proposed use or activity.
(c) Be necessary to meet the intent and purpose of the zoning requirements, be related to the standards established in the zoning ordinance for the land use or activity under consideration, and be necessary to insure compliance with those standards.
(d) The conditions imposed with respect to the approval of a land use or activity shall be recorded in the record of the approval action and remain unchanged except upon the mutual consent of the approving authority and the landowner. The approving authority shall maintain a record of conditions which are changed."

Conditions attached to a decision should have one purpose --- to make sure that the standards used to make the decision are met. In other words, if the condition was not in place, the project would fail to meet the standards of the ordinance and must be denied.

The City of Battle Creek's Ordinance Criteria for Considering Special Use Permits

Chapter 1290.04 lists the criteria by which it will consider the issuance of special use permits. In preparing Staff Reports and Recommendations for petitions for special use permits, the Planning Department always includes these standards as reminder for the Planning Commission and City Commission. We also ask that for the official record, when voting not to recommend a special use permit, that the Planning Commission clearly state the reasons for recommending denial. This is necessary in the event of a legal challenge of the proceedings, and should include a specific reference to the appropriate section of the Basis for Determination that one feels is not being met, and could not be met with the imposition of conditions.

1290.04 BASIS FOR DETERMINATION

The Planning Commission and the City Commission shall establish, beyond a reasonable doubt, that the general standards specified in the following shall be satisfied by the completion and operation of a proposed development:

(a) The use will be harmonious with and in accordance with the general objectives of the Master Plan.
(b) The use will be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and will not change the essential character of the neighborhood.
(c) The use will not be hazardous or disturbing to existing or future neighboring uses.
(d) The use will be a substantial improvement to property in the immediate vicinity and to the community as a whole.
(e) The use will be adequately served by essential public facilities and services, such as streets, highways, police and fire protection, drainage, refuse disposal and schools, or the persons or agencies responsible for the development shall be able to adequately provide such services.
(f) The use will not create excessive additional requirements at public cost for public facilities and services and will not be detrimental to the economic welfare of the community.
(g) The use will not create activities, processes, materials, equipment or conditions of operation that will be detrimental to any person, property or the general welfare by reason of an excessive generation of traffic, noise, smoke, fumes, glare, vibrations or odors.
(h) The use will be consistent with the intent and purpose of this Zoning Code.
(Ord. 36-84. Passed 12-18-84.)

It is often the case that local agencies follow a general set of standards in considering a conditional use permit. These standards are generally acceptable since it is a nearly impossible to devise standards to cover all possible situations in which a use permit can be issued.

We have taken the following from the State of California Planner Training website, wherein it is recommended that in crafting criteria for reviewing special use permits, that the criteria must address the following:

- **A General Welfare Standard:** *The establishment, maintenance or conducting of the use for which a use permit is sought will not, under the particular case, be detrimental to the public welfare or injurious to property or improvements in the neighborhood.*
- **A Nuisance Standard:** *Any use found to be objectionable or incompatible with the character of the city and its environs due to noise, dust, odors or other undesirable characteristics may be prohibited.*
- **A Comprehensive Plan Consistency Standard:** *Special use permits are struck from the mold of zoning law, and zoning law must comply with the adopted comprehensive plan, and the adopted comprehensive plan must conform with state law. This hierarchy of planning laws establishes the validity for requiring consistency with the comprehensive plan.*

- **A Zoning Consistency Standard:** *To obtain a special use permit, the applicant must generally show that the contemplated use is compatible with the policies in terms of the zoning ordinances, and that such use would be essential or desirable to the public convenience or welfare, and will not impair the integrity and character of the zoned district or be detrimental to the public health, safety, morals or welfare.*

In looking at this guideline for drafting special use permit criteria, and after looking at the ordinance criteria for a number of other communities, we have come to be generally pleased with our ordinance's addressing each of these standards. We do believe that the actual language could be improved, as we have always had issues with the use of words such as "*harmonious*", or the "*character of the neighborhood*" when interpreting or enforcing the zoning ordinance.

While not included here, we would like to put together a revised draft of a section to be titled "Criteria for Granting a Special Use Permit" that could replace Section 1290.04's Basis for Determination.